Supreme Court, U.S.
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No. 96-89

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, *EX REL.*
JAMES M. HAGOOD,

Petitioner,

vs.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

Petitioner James M. Hagood submits this reply brief to correct significant mischaracterizations contained in respondent's opposition brief.

I. CONFLICT WITHIN THE CIRCUITS

Respondent has argued in its opposition brief that a conflict does not exist within the circuit courts of appeal on the jurisdictional standards to be applied in qui tam actions. However, respondent does not explore its argument beyond the mere allegation of an absence of conflict. Having made the assertion, respondent then claims the petition arises from disputed factual issues and is therefore unworthy of review by the United States Supreme Court.

The intercircuit conflict regarding qui tam jurisdictional standards cannot be eliminated by a simple assertion of its non-existence. In his petition, Mr. Hagood demonstrated a sharp and pervasive conflict on essentially every element of 31 U.S.C. §3730(e)(4). The existence of this conflict has been the subject of other petitions for writ of certiorari, at least one of which is currently pending before this Court. *Hughes Aircraft Company v. United States ex rel. Schumer,* No. 95-1340, 64 U.S.L.W. 3593. Moreover, the conflict has intensified to such a level that it has become the subject of discussion within the opinions of the circuit courts themselves. Most recently, the Tenth Circuit Court of Appeals noted that "our sister circuits are divided" on the standards to be applied in interpreting the "allegations or transactions"

provisions of 31 U.S.C. §3730(e)(4). *United States ex rel. Ramseyer v. Century Healthcare Corporation*, 90 F.3d 1514, 1996 WL 412819, *3 (10th Cir. 1996).

Mr. Hagood's petition presents a unique opportunity for this Court. While other petitions, including *Schumer*, involve a limited number of jurisdictional standards, the issues presented in Mr. Hagood's petition encompass essentially every standard under 31 U.S.C. §3730(e)(4). Thus, review of this case would permit the Court to determine the proper interpretation to be given the following elements of 31 U.S.C. §3730(e)(4): "public disclosure," "allegations or transactions," "news media," "original source," "direct and independent knowledge," and "voluntarily provided."

II. MISCHARACTERIZATION OF PETITIONER'S CLAIM FOR RELIEF

In its opposition brief, respondent has mischaracterized petitioner's claim for relief. No less than 36 times Sonoma County Water Agency has described Mr. Hagood's claim with the phrase "the fixed repayment dates" claim. This semantic limitation commences on the first page of respondent's brief and continues unabated to the last page. Each of respondent's arguments relies upon that particular semantic construct. In doing so, Sonoma bases its arguments on a nonexistent strawman. The following are demonstrative:

- On pages 3 and 4 of its opposition brief, Sonoma claims Mr. Hagood did not "raise any concern as to the use of fixed repayment dates while he was with the Corps . . . ", and

that memoranda written by him were "silent as to any concern with fixed repayment dates based on estimated first use dates." While Mr. Hagood takes issue with those assertions, they only have importance to the extent Mr. Hagood's claim can be characterized as a "fixed repayment dates" claim. Otherwise, raising that narrowly defined issue in any forum would have been of no significance.

- On pages 5-7 of Sonoma's opposition brief, it argues that the Circuit Court of Appeals for the District of Columbia "held," "recognized," and "stated" that the fixed repayment dates of the contract were not violative of the Water Supply Act. *City of Ukiah v. FERC*, 729 F.2d 793 (D.C. Cir. 1984). The relevance of the *Ukiah* decision has been previously discussed by petitioner in his brief. *See*, in particular, the discussion on pages 14-21 of the Petition for Writ of Certiorari. This Court can make its own determination as to the propriety of using words such as "held," "recognized," and "stated," when describing any comments made by the *Ukiah* court regarding "fixed repayment dates", but it is of some significance that respondent – in using such words – refers to *dicta* contained not even in the text of the *Ukiah* opinion but rather in footnotes to that opinion. Mr. Hagood's investigation and complaints preceded the *Ukiah* transactions relied upon by respondent, making him the original source for purposes of the statute. Moreover, the *Ukiah* decision was rendered before the commencement of Sonoma's fraudulent failure to

make payments pursuant to the Water Supply Act, and, accordingly, the decision did not – and could not have – addressed the fraudulent misconduct that is the basis of Mr. Hagood's repayment claim. Finally, as with Sonoma's contention that Mr. Hagood made no specific reference to "fixed repayment dates" in earlier memoranda, Sonoma's arguments concerning *Ukiah* are dependent upon Mr. Hagood's claim being characterized as a "fixed repayment dates" claim. It is not.

- Sonoma's jurisdictional arguments contained in pages 8-14 posit a "fixed repayment dates" claim. It is not.

- On pages 15-17, Sonoma contends that Mr. Hagood did not make initial complaints concerning the fixed repayment dates. While petitioner disagrees with that assertion, it is a point that would only be relevant if Sonoma's characterization of Mr. Hagood's claim were correct.

- Likewise, on pages 17-19, respondent argues that the original source doctrine is not applicable because, inter alia, Mr. Hagood did not criticize the fixed repayment dates in the contract when he made his prefiling disclosure to the Attorney General.[1] Again, Mr.

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[1] The statements made by Sonoma County Water Agency in its opposition brief concerning the prefiling disclosures to the Attorney General are particularly disturbing. The extensiveness of Mr. Hagood's compliance with the requirements of 31 U.S.C. §3730(c)(4)(B) is well established in the record of this case. Respondent's portrayal is, to say the least, misleading. On February 19, 1988 – more than a month before Mr. Hagood filed

> Hagood disagrees with that particular assertion, but – more germane – the argument lacks relevance inasmuch as Mr. Hagood has not presented a "fixed repayment dates" claim.

Respondent's portrayal of Mr. Hagood's claim as the "fixed repayment dates" claim is only useful for the

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his complaint under seal with the United States District Court for the Northern District of California – Mr. Hagood's counsel sent a registered letter to the Honorable Edwin Meese III. The letter is found in the record below as ER-88 and 89 and is reprinted in the Appendix hereto at RA-1-3. As explained in Mr. Hagood's petition (pages 4-5), the claim presented by Mr. Hagood for this Court's review concerns his *repayment claim*, not a "fixed repayment dates" claim. That claim concerns Sonoma's fraudulent failure to make payments to the federal treasury as required by the Water Supply Act. This fraud was specifically presented by Mr. Hagood's counsel in the February 19, 1988 letter, which stated in part as follows: "Since 1983 the United States may have incurred damages in the tens of millions of dollars resulting from the total absence of any repayments on this matter caused by misleading or false statements and knowing failures to obtain required approvals. I believe time is of the essence, and the Justice Department is alerted by this notice of the matters in question." In addition to having "voluntarily provided the information to the government" with this letter, as required by 31 U.S.C. §3730(e)(4)(B), Mr. Hagood went several steps beyond these requirements. Mr. Hagood's counsel stated in the letter "[a]ll of the documents which my client has on this matter will be made available for the Justice Department's review in my office"; in addition, the letter explicitly solicited a meeting to fully discuss the matter and pledged Mr. Hagood's full cooperation with the Justice Department. Forty-eight tabs of documents and information were available for review. The government – through the Attorney General and the Department of Justice – chose not to avail itself of these offers.

purpose of constructing a straw argument. As discussed in Mr. Hagood's petition,[2] his claim for relief has been, and continues to be, a repayment claim. As mentioned on pages 4-5 of the petition, this claim is based upon the fact that Sonoma "had used false information and concealed other information to avoid the terms of repayment required under the Water Supply Act a) by fraudulently failing to make payments to the federal treasury in spite of the fact that the "trigger date" (first use) had occurred, and b) by attempting to reduce and conceal its repayment obligations through the use of a fraudulently negotiated contract with the Corps of Engineers."

Mr. Hagood had alleged from the outset of his investigation – an investigation that predated *any* action relied upon by respondent – that the repayment schedule itself was invalid and unenforceable; he had alleged that the negotiation and execution of the amended contract, including the fixed repayment schedule, were evidence of Sonoma's fraudulent misconduct. But the actionable conduct under this claim for relief arises from the factual allegations he has made in these proceedings concerning the fraudulent failure by Sonoma to make payments to the federal treasury once it commenced "first use" of the water supply from Warm Springs Dam.

III. ELIMINATION OF ORIGINAL SOURCE DOCTRINE

The argument presented by respondent in its opposition brief would eliminate the original source doctrine

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[2] See pages 4-5 and FN 7 at page 6 of the Petition.

from the False Claims Act. 31 U.S.C. §3730(e)(4)(A) provides that a court shall not "have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions. . . . " Mr. Hagood's petition details the reasons the FERC proceeding and the laudatory newspaper article do not qualify under this public disclosure provision. The argument presented by respondent in its opposition brief is dependent upon the characterization of the "allegations or transactions" relating to the "fixed repayment dates." As mentioned previously, that characterization is inaccurate.

Of equal significance, however, is the fact that respondent ignores the importance of the original source doctrine. Congress expressly excluded original sources from this provision. There can be no doubt that Mr. Hagood qualifies as the original source concerning Sonoma's fraudulent failure to make payments pursuant to the Water Supply Act. His investigation commenced in 1981 and his internal memoranda were written well before the *Ukiah* letters relied upon by respondent. Once first use commenced, after the 1984 "plant in service date," Sonoma County Water Agency began its pattern of fraudulently failing to repay the government as required by the terms of the Water Supply Act.

The record is entirely devoid of any individual, agency, or department making any complaint whatsoever concerning the resulting damage to the federal fisc other than Mr. Hagood. He observed water flowing from the dam into the respondent's water system; he took pictures of the usage; he examined records maintained by the

Sonoma County Water Agency and the Corps of Engineers to determine that Sonoma had failed to make payments to the federal government during that period.

During the litigation he presented these facts to the court and he also presented affidavits, including an affidavit from a professional hydrologist who testified concerning Sonoma's usage. Sonoma's fraud has gone unrectified for more than ten years, and that fact stands as stark testament to the importance of qui tam actions in policing fraud committed against the federal treasury.

IV. CONCLUSION

Issuance of a writ of certiorari in this case will permit this Court to determine the jurisdictional standards to be applied to qui tam actions. Intercession by the United States Supreme Court is warranted, not only to review the ruling of the Ninth Circuit Court of Appeals in this case, but also to resolve the intercircuit conflict that permeates decisions of the circuit courts of appeal.

Respectfully submitted,

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APPENDIX

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February 19, 1988

REGISTERED MAIL

The Honorable Edwin Meese, III
Attorney General of the United States
Main Justice Building, Suite 5111
10th and Constitution Avenue, N.W.
Washington, D.C. 20536

RE: Fraud against United States in connection with Federal Project in Northern California; False claims to reduce repayments to United States; Notice to Department of Justice

Dear Mr. Meese:

This letter is on behalf of my client who is currently a resident of California.

It concerns a fraud which we believe has been perpetrated against the United States in connection with the approval of a repayment contract on a federal project in California so as to deny the United States its full repayment required by law.

My client has information and documents which indicate that the amounts of repayment were reduced by over 50 Million Dollars, and this occurred through false

statements made, and false records used which caused a decrease in the repayment obligation to the United States.

All of the documents which my client has on this matter will be made available for the Justice Department's review in my office. Further, my client is willing to meet with Justice Department attorneys to discuss this matter, and full cooperation will be made by my client with the Justice Department on this matter.

Since 1983 the United States may have incurred damages in the tens of millions of dollars resulting from the total absence of any repayments on this matter caused by misleading or false statements and knowing failures to obtain required approvals. I believe time is of the essence, and the Justice Department is alerted by this notice of the matters in question.

If the Department of Justice, through its appropriate representatives, and on behalf of the United States, desires to make an appointment to review the documents which are available for review in my office, or to meet with my client to fully discuss this matter in my office, please advise me by forwarding your communications directly to me.

Thank you for your prompt attention to this matter.

Very truly yours,

Lawrence G. Townsend

LGT:lm

cc: By Registered Mail/Return Receipt
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